

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

MACLEAN TOWNHOMES, LLC, a Washington limited liability company, as assignee of American Heritage Builders, a Washington corporation,

**Plaintiff,**

V.

CHARTER OAK FIRE INSURANCE  
CO., a foreign insurance company,

Defendant and Third- Party  
Plaintiff,

V.

**FIRST SPECIALTY INSURANCE  
COMPANY, a foreign insurance  
company,**

## Third-Party Defendant.

CASE NO. C06-1093BHS

**ORDER GRANTING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND  
DENYING CHARTER OAK'S  
MOTION FOR SUMMARY  
JUDGMENT**

This matter comes before the Court on Plaintiff's Motion for Partial Summary Judgment Re: Insurance Coverage (Dkt. 56) and Defendant Charter Oak Fire Insurance Co.'s ("Charter Oak") Motion for Summary Judgment of Dismissal of Plaintiff's Complaint (Dkt. 65). The Court has considered the pleadings filed in support of and in opposition to the motions, the declarations filed in support and opposition of the motions, and the remainder of the file, and hereby grants Plaintiff's motion and denies Charter Oak's motion for the reasons stated herein.

## 1                   **I. SUMMARY JUDGMENT STANDARD**

2                   Summary judgment is proper only if the pleadings, depositions, answers to  
3 interrogatories, and admissions on file, together with the affidavits, if any, show that there  
4 is no genuine issue as to any material fact and the moving party is entitled to judgment as  
5 a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a  
6 matter of law when the nonmoving party fails to make a sufficient showing on an  
7 essential element of a claim in the case on which the nonmoving party has the burden of  
8 proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of  
9 fact for trial where the record, taken as a whole, could not lead a rational trier of fact to  
10 find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475  
11 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative  
12 evidence, not simply “some metaphysical doubt.”). *See also* Fed. R. Civ. P. 56(e).  
13 Conversely, a genuine dispute over a material fact exists if there is sufficient evidence  
14 supporting the claimed factual dispute, requiring a judge or jury to resolve the differing  
15 versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W.*  
16 *Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

17                   The determination of the existence of a material fact is often a close question. The  
18 court must consider the substantive evidentiary burden that the nonmoving party must  
19 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477  
20 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual  
21 issues of controversy in favor of the nonmoving party only when the facts specifically  
22 attested by that party contradict facts specifically attested by the moving party. The  
23 nonmoving party may not merely state that it will discredit the moving party's evidence at  
24 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*  
25 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific  
26 statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan*  
27 *v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

## II. PLAINTIFF'S MOTION

2 Plaintiff moves for summary judgment on the limited issue of whether the  
3 judgment against AHB falls within the terms of Charter Oak’s policy. Dkt. 93 at 2. When  
4 interpreting an insurance policy, the Court should give the policy “a fair, reasonable, and  
5 sensible construction as would be given to the contract by the average person purchasing  
6 insurance.” *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682 (1990). When the language  
7 of the contract is unambiguous, as is the case here, and Charter Oak has not argued to the  
8 contrary, “the court must enforce it as written and may not modify it or create ambiguity  
9 where none exists.” *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654,  
10 666 (2000).

11 In order to evaluate an insurance contract in Washington State the Court must  
12 undertake a two-step process. *McDonald v. State Farm Fire & Gas. Co.*, 119 Wn.2d 724,  
13 731 (1992).

14 The burden first falls on the insured to show its loss is within the scope of  
15 the policy's insured loss. If such a showing has been made, the insurer can  
16 nevertheless avoid liability by showing the loss is excluded by specific  
17 policy language.  
18  
19 *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 431-32 (2002) (citing *McDonald*, 119  
20 Wn.2d at 731). In the instant matter, from the declarations and exhibits before the Court,  
21 Plaintiff has shown some "property damage" resulting from deficiencies caused by  
22 American Heritage Builders or their subcontractors. The Court finds that at least some of  
23 this "property damage" does fall within the terms of Charter Oak's policy. With respect  
24 to whether any policy exclusions apply, Charter Oak has not contradicted Plaintiff's  
25 arguments that the policy exclusions do not apply at least to some of the damages  
26 resulting from the work performed by American Heritage Builders and its subcontractors.  
27  
28 However, the Court will not preclude Charter Oak from raising applicable policy  
29 exclusions to particular damages asserted in a reasonableness hearing. The Court also  
30 finds that under Washington law the damage resulted from multiple occurrences and is  
31

1 thus subject to the \$2 million aggregate limit. The issues of the reasonableness of the  
2 judgment or whether Charter Oak is relieved of its liability due to American Heritage  
3 Builder's alleged failure to allow Charter Oak to participate in the settlement of this  
4 matter or receive its consent are not decided or disposed of here. Charter Oak may  
5 contest the reasonableness of the settlement judgment and may argue that it is relieved of  
6 all liability due to the alleged breach of contract by American Heritage Builders.

7 **III. CHARTER OAK'S MOTION**

8 Charter Oak moves for summary judgment dismissal of Plaintiff's claim based on  
9 the alleged breach of contract by American Heritage Builders for failure to allow Charter  
10 Oak to participate in settlement negotiations and for failure to receive Charter Oak's  
11 consent when entering into the settlement judgment with Plaintiff. Dkt. 65. The Court  
12 finds that summary judgment is not appropriate based on the record before the Court.  
13 Charter Oak has failed to show as a matter of law that under the circumstances present in  
14 this case, American Heritage Builders breached its contractual duties to allow Charter  
15 Oak to participate and consent in entering into the stipulated judgment with Plaintiff. "An  
16 insurer cannot deprive an insured of the benefit of purchased coverage absent a showing  
17 that the insurer was actually prejudiced by the insured's noncompliance" with the  
18 cooperation clause. *Public Utility Dist. No. 1 of Klickitat County v. International*  
19 *Insurance Co.*, 124 Wn.2d 789, 804 (1994). The determination of whether actual  
20 prejudice exists is a factual determination and the burden of proof is on the insurer. *Id.*  
21 Actual "prejudice will be presumed only in extreme cases." *Felice v. St. Paul Fire &*  
22 *Marine Ins. Co.*, 42 Wn. App. 352, 359 (1986). The Court finds that Charter Oak has not  
23 carried its burden and that this case does not warrant a presumption of actual prejudice.  
24 Therefore, the motion should be denied.

## IV. ORDER

It is **ORDERED** that Plaintiff's Motion for Partial Summary Judgment Re: Insurance Coverage (Dkt. 56) is hereby **GRANTED** as indicated herein and Defendant Charter Oak Fire Insurance Co.'s Motion for Summary Judgment of Dismissal of Plaintiff's Complaint (Dkt. 65) is hereby **DENIED**.

DATED this 7th day of May, 2008.

  
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**BENJAMIN H. SETTLE**  
United States District Judge